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### Equal Protection

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and, as such, was prohibited.<sup>154</sup> As a matter of constitutional law, *Tanya P.* points out that the New York Equal Protection Clause goes further than the Federal Equal Protection Clause, in that it deems discrimination based on pregnancy gender discrimination, thus subjecting it to review under intermediate scrutiny.

### RENSSELAER COUNTY

#### Jubic v. City of Troy City Corporation<sup>155</sup> (decided October 4, 1995)

Plaintiff, an applicant to become a municipal firefighter, passed an open competitive examination for the position prior to reaching the age of thirty-five, however, he was not offered the position until after turning age thirty-five.<sup>156</sup> Plaintiff brought an action against the municipality seeking an order stating that he had been denied his right to equal protection under the New York State<sup>157</sup> and Federal Constitutions<sup>158</sup> when the municipality refused to hire him.<sup>159</sup> The Supreme Court, Rensselaer County, held that defendants' requirement, that firefighter applicants be under the age of thirty-five in order to take the open competitive examination, was not violative of the Federal Constitution or the

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154. *See supra* notes 80-82 and accompanying text.

155. 166 Misc. 2d 326, 633 N.Y.S.2d 720 (Sup. Ct. Rensselaer County 1995).

156. *Id.* at 328, 633 N.Y.S.2d at 721.

157. N.Y. CONST. art. I, § 11. Article I, § 11 provides in pertinent part: No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

*Id.*

158. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

159. *Jubic*, 166 Misc. 2d at 328, 633 N.Y.S.2d at 721.

New York State Constitution.<sup>160</sup> The court determined that a rational relationship existed to a legitimate governmental purpose because firefighters must exert “extraordinary physical effort”<sup>161</sup> in the performance of their jobs and, as a result, a maximum age limitation was permissible.<sup>162</sup>

In 1991, before reaching age thirty-five, the plaintiff took a firefighter examination in the City of Troy.<sup>163</sup> He passed the exam, which was to be administered only to people who had not yet turned thirty-five.<sup>164</sup> The exam notice stated that a candidate could not be younger than nineteen nor older than thirty-five on the date they took the written test.<sup>165</sup> The notice further stated that a candidate would no longer be eligible for appointment once he or she reached the age of thirty-five.<sup>166</sup>

The plaintiff received a letter, dated May 31, 1994, which stated that the Troy Civil Service Commission had determined that he had qualified to become a firefighter.<sup>167</sup> The letter also asked the plaintiff if he wanted to accept the position, and plaintiff responded in the affirmative.<sup>168</sup> The plaintiff was then

160. *Id.* at 331, 633 N.Y.S.2d at 723.

161. N.Y. CIV. SERV. LAW § 54 (McKinney 1958). This section states in part:

Notwithstanding any provision of law to the contrary . . . neither the state civil service department . . . nor any municipal civil service commission shall prohibit, prevent, disqualify, or discriminate against, any person . . . by reason of his or her age; and any such rule, requirement, resolution, regulation or penalization shall be void. Nothing herein contained, however, shall prevent the adoption of reasonable minimum or maximum age requirements for open competitive examinations for positions such as policeman, fireman, prison guard, or other positions which require *extraordinary physical effort*, except where age limits for such positions are already prescribed by law.

*Id.* (emphasis added). This section, however, was later amended, effective July 6, 1994.

162. *Jubic*, 166 Misc. 2d at 329, 633 N.Y.S.2d at 722.

163. *Id.* at 327, 633 N.Y.S.2d at 721.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 327-28, 633 N.Y.S.2d at 721.

formally offered the position in a letter from the Troy City Manager dated July 1, 1994.<sup>169</sup> However, as a condition precedent to being hired, the letter stated that the plaintiff first had to pass a physical fitness test and a physical examination.<sup>170</sup> The plaintiff returned the letter accepting the position and was conditionally admitted to the firefighter's fitness test that was to be administered on July 18, 1994.<sup>171</sup> The admission was conditional because the plaintiff had already attained the age of thirty-five.<sup>172</sup> The condition stipulated that if the Troy Civil Service Commission did not change its regulation, which did not allow a candidate to be appointed once he or she reached the age of thirty-five, then the plaintiff would not be able to obtain an appointment as a firefighter although he passed all pre-employment tests.<sup>173</sup> At a subsequent meeting held on July 7, 1994, the Troy Civil Service Commission opted to keep the age limitation in force.<sup>174</sup> In the interim, the plaintiff passed the physical fitness test and the physical examination, but was not allowed to begin serving as a firefighter.<sup>175</sup> Plaintiff then instituted this action, claiming that the age restriction violated his equal protection rights, that he was entitled to the appointment as a firefighter with full seniority rights, and for attorney fees of \$10,000 for a violation of 42 U.S.C. § 1981.<sup>176</sup>

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169. *Id.* at 328, 633 N.Y.S.2d at 721.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* 42 U.S.C. § 1981(a) (Supp. V 1993). This subsection states in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

*Id.*

In considering the plaintiff's argument that the Equal Protection Clause of the Fourteenth Amendment had been violated, the court stated that "the Fourteenth Amendment of the Federal Constitution forbids States from denying to any person within their jurisdiction the equal protection of the laws, but does not prevent the States from making reasonable classifications among persons."<sup>177</sup> Further, the court concluded that "[s]ince the situation at bar does not involve a suspect class or a fundamental right, it would appear that the rational basis standard of review is appropriate to determine if the City's action violated the equal protection clause."<sup>178</sup>

In determining that rational basis was the appropriate standard of review to apply, the court relied on the reasoning of the United States Supreme Court in *Massachusetts Board of Retirement v. Murgia*.<sup>179</sup> In *Murgia*, the Supreme Court was faced with the question of whether a state statute requiring a "uniformed state police officer" to retire when he or she reached fifty years of age violated the Equal Protection Clause.<sup>180</sup> The Court stated that an "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."<sup>181</sup>

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177. *Jubic*, 166 Misc. 2d at 331, 633 N.Y.S.2d at 723 (citing *Western & S. Life Ins. Co. v. Board of Equalization*, 451 U.S. 648 (1981)). In *Western*, the Supreme Court was faced with the question of whether or not a tax scheme implemented by the state of California, which imposed a higher tax burden on foreign insurance companies than on insurance companies doing business in the state, was constitutional. *Western*, 451 U.S. at 650. In determining that the classification did not violate the Equal Protection Clause, the Court stated that there are situations where "subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently." *Id.* at 668. (quoting *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493-94 (1927)). In addition, the Court stated that the classification would be appropriate as long as "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.*

178. *Jubic*, 166 Misc. 2d at 331, 633 N.Y.S.2d at 723.

179. 427 U.S. 307 (1976).

180. *Id.* at 308.

181. *Id.* at 312.

The Court determined that since the “right of governmental employment [is not] *per se* . . . fundamental”<sup>182</sup> and a classification based on age is not considered suspect, rational basis was the appropriate standard of review to be applied.<sup>183</sup>

Pursuant to this reasoning, the court in *Jubic* declared that the classification would be evaluated under rational basis scrutiny, since the right at issue here also dealt with government employment and the classification was based on age.<sup>184</sup> Hence, no fundamental right or suspect class was present to trigger heightened scrutiny.<sup>185</sup>

In applying the rational basis test to the case at hand, the court in *Jubic* relied on the reasoning of the New York Court of Appeals in *Matter of Figueroa v. Bronstein*.<sup>186</sup> In *Figueroa*, the court had to determine whether a limitation placed on the age of correction officer applicants violated the state constitution.<sup>187</sup> The court of appeals held that a minimum age requirement was permissible, because correction officers must exert “extraordinary physical effort” in the performance of their jobs.<sup>188</sup> The court declared that an age limitation would survive constitutional scrutiny if it bore a rational relationship to a

182. *Id.* at 313.

183. *Id.* at 313-14.

184. *Jubic v. City of Troy*, 166 Misc. 2d 326, 331, 633 N.Y.S.2d 720, 723 (Sup. Ct. Rensselaer County 1995). See *Gregory v. Ashcroft*, 501 U.S. 452 (1991). In *Gregory*, the Supreme Court determined that the provision in the Missouri Constitution which required judges to retire at the age of 70, as applied to certain judges, did not violate the plaintiffs’ equal protection rights because a rational basis existed for making a distinction between judges under age 70 and judges over 70 years of age. *Id.* at 473. The Court asserted that “[i]n cases where a classification burdens neither a suspect group nor a fundamental interest, ‘courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.’” *Id.* at 470-71 (quoting *Murgia*, 501 U.S. at 314).

185. *Id.*

186. 38 N.Y.2d 533, 344 N.E.2d 402, 381 N.Y.S.2d 470 (1976).

187. *Id.* at 534, 344 N.E.2d at 403, 381 N.Y.S.2d at 470-71.

188. *Id.* at 535, 344 N.E.2d at 403, 381 N.Y.S.2d at 471. The court determined that it was permissible under the Constitution for respondents to establish the age of 32 as a maximum. *Id.* at 535-36, 344 N.E.2d at 404, 381 N.Y.S.2d at 471

legitimate governmental purpose.<sup>189</sup> The court determined that drawing the line at age thirty-two was rationally related to the governmental interest in assuring the physical ability of an applicant to perform the duties of a corrections officer.<sup>190</sup> Further, the court maintained that it was rational for the municipality to set the age limit so that the applicant would remain qualified to serve for a long period of time.<sup>191</sup>

Accordingly, the court in *Jubic* determined that under rational basis review, the age limitation for firefighters imposed by the defendants did not violate either the New York State or the Federal Constitution because this type of employment also required the same type of extraordinary physical stamina and power.<sup>192</sup> The supreme court applied the same form of rational basis review to evaluate both the federal and the state equal protection claims.<sup>193</sup>

In addition, in examining the question before it, the court evaluated the relevant parts of section 54 of the Civil Service Law.<sup>194</sup> The court concluded, generally, that the adoption of age limitations by a municipality as an employment prerequisite is not within the bounds of the law.<sup>195</sup> An exception to this rule,

189. *Id.* at 535, 344 N.E.2d at 403, 381 N.Y.S.2d at 471.

190. *Id.* at 535, 344 N.E.2d at 403-04, 381 N.Y.S.2d at 471.

191. *Id.* at 535, 344 N.E.2d at 404, 381 N.Y.S.2d at 471.

192. *Jubic v. City of Troy*, 166 Misc. 2d 326, 331, 633 N.Y.S.2d 720, 723 (Sup. Ct. Rensselaer County 1995). *See Timerman v. Bence*, 176 A.D.2d 1220, 576 N.Y.S.2d 714 (4th Dep't 1991). In *Timerman*, the Appellate Division, Fourth Department, was faced with the question of whether the plaintiff's equal protection rights were violated when he was denied employment as a firefighter for being over 30 years old. *Id.* at 1221, 576 N.Y.S.2d at 715. In determining that there was no equal protection violation, the court stated that the "age requirement for firefighters [is constitutional] [b]ecause firefighters must exert 'extraordinary physical effort' in the performance of their jobs." *Id.* In addition, the court reasoned that "[a]n age limitation will survive constitutional scrutiny if it bears a rational relationship to a legitimate governmental purpose[,] [and] [d]rawing the line at age 30 is rationally related to the governmental interest in assuring the physical ability of an applicant to perform the duties of firefighter." *Id.* (citations omitted).

193. *Jubic*, 166 Misc. 2d at 331, 633 N.Y.S.2d at 723.

194. *Id.* at 328-29, 633 N.Y.S.2d at 722. *See N.Y. CIV. SERV. LAW* § 54.

195. *Jubic*, 166 Misc. 2d at 329, 633 N.Y.S.2d at 722.

however, states that “*reasonable requirements may be adopted for open competitive examinations*” when considering certain positions, such as that of a firefighter.<sup>196</sup> There is no mention, however, in Civil Service Law section 54, of the utilization of age restrictions connected to selection for such employment *after* the examination had been administered to the applicant.<sup>197</sup> Accordingly, the court concluded that such an age limitation, like the one within the notice for the open competitive examination for employment as a firefighter for the City of Troy, was expressly void under section 54 of the Civil Service Law “to the extent that it attempted to disqualify otherwise qualified candidates for the firefighter position who attained age thirty-five prior to the date of appointment.”<sup>198</sup> The court stated that although the Troy Civil Service Commission and the City of Troy were permitted to implement “reasonable age restrictions” when considering a candidate’s fitness for participating in an open competitive examination, they were not allowed to utilize any other age constraints.<sup>199</sup>

According to the rationale of the court, the plaintiff’s right to equal treatment under the law was offered no greater protection under the New York State Constitution than under the Federal Constitution. The supreme court applied the same level of rational basis review to both the state and federal equal protection claims. The court relied on the holding of the New York Court of Appeals in *Matter of Figueroa v. Bronstein*,<sup>200</sup> which stands for the proposition, consistent under both Federal and New York State Constitutions, that a rational relationship existed between the legislation imposing an age limitation on open competitive examinations for firefighters and the legitimate governmental purpose of assuring the physical ability of an applicant to perform the duties of a firefighter.

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196. *Id.* (emphasis added).

197. *Id.*

198. *Id.* at 330, 633 N.Y.S.2d at 723.

199. *Id.* at 330-31, 633 N.Y.S.2d at 723.

200. 38 N.Y.2d 533, 344 N.E.2d 402, 381 N.Y.S.2d 470 (1976).



